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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/788,418	03/01/2004	Per Pihlmann Isager	030427-0107	4956
22428	7590	06/20/2006	EXAMINER	
FOLEY AND LARDNER LLP			BRUNSMAN, DAVID M	
SUITE 500			ART UNIT	
3000 K STREET NW			PAPER NUMBER	
WASHINGTON, DC 20007			1755	

DATE MAILED: 06/20/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/788,418

Applicant(s)

ISAGER ET AL.

Examiner

David M. Brunsman

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 26-51 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 26-51 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____. |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date <u>20040301</u> . | 6) <input type="checkbox"/> Other: ____. |

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The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 26-51 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 20 and 22; 2; 3; 4; 6; 21; 1, 20 and 22; 11; 9 and 22; 7 and 20; 7 and 20; 9 and 22; 8; 10; 11; 12; 13; 14; 16; 23 and 26; 23 and 26; 24 and 27; 25 and 28; 26; 27 and; 28; respectively of U.S. Patent No. 6719839.

Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant claims fully encompass the claims of the patent in that they include proportions of water present broader than that of the patent. The recitation in the patent claims of certain properties observed when employed in the intended future (claims 17, 20 and 22, for example) fails to patentably distinguish those products from the otherwise similar products of the application in that the similar materials treated by similar process steps would be expected to exhibit similar properties.

Claims 26, 27, 28, 30, 32, 33, 34, 35, 36, 37, 38, 40, 43 and 44 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1; 2; 2; 4; 1; 1; 10; 8; 8; 10; 9; 11 and 19; 14; 11 and 19 in view of 5 of U.S. Patent No. 6190686. Although the conflicting claims are not identical, they are not

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patentably distinct from each other because the claims differ 1) in the scope of the ranges of amounts of water present 2) the scope of the amount of hydrocolloid present and, 3) the scope of the natural pigment composition.

1) The recitation of an aqueous component or the recitation of at least 5% of an aqueous component is anticipated by the patent recitation of at least 10% water and the claims substantially overlap thereby.

2) The recitation of a hydrocolloid component is anticipated by the patent recitation of at least 1% hydrocolloid and the claims substantially overlap thereby.

3) The patent recited a natural pigment component that is water-insoluble and/or hydrophobic. Three possibilities are then encompassed. The natural pigment may be water-insoluble and hydrophobic, water-insoluble and hydrophilic or, hydrophobic and water-soluble. The selection of a single species, water-insoluble, hydrophilic, from among this very limited group of three would have been immediately envisioned by one of ordinary skill in the art reading the patented claims.

Claim 45 differs from claims 11 and 19 by reciting *further* addition of carbohydrate (i.e. in addition to the hydrocolloid). Claim 5 of the patent teaches that the same composition may include addition of a carbohydrate in addition to the hydrocolloid. It would have been obvious to one of ordinary skill in the art to include a step of adding such a carbohydrate in the process of claims 11 or 19 because claim 5 teaches addition of carbohydrates to the same composition formed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to David M. Brunsman whose telephone number is 571-272-1365. The examiner can normally be reached on M, W, F, Sa; 6:00-4:30.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jerry Lorengo can be reached on 571-272-1362. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

David M Brunsman
Primary Examiner
Art Unit 1755

DMB

A handwritten signature in black ink, appearing to read 'David M Brunsman', with a long horizontal flourish extending to the right.